

Federal Agencies Subject to the Data Quality Act

by

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The Data Quality Act (DQA) is an attempt by Congress to ensure that federal agencies use and disseminate accurate information. The DQA requires federal agencies to issue information quality guidelines ensuring the quality, utility, objectivity and integrity of information that it disseminates and provide mechanisms for affected persons to correct such information. It is important for environmental attorneys to be aware of this law in the event that a client has an interest in filing a petition with an agency to challenge the quality of information it has used or disseminated. Questions that remain unanswered about the DQA are whether agency information quality guidelines apply to rule-making and whether an agency's denial of a petition to correct information is reviewable by the courts.

I. Background Information

In 1980, Congress enacted the Paperwork Reduction Act (PRA) in response to the federal government's growing demand for data from small businesses, individuals, and state and local governments and attempted to institute controls over government requests for data. 44 U.S.C. ' 3501(1). Under the PRA, Congress established the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) and designated it as the overseer of other federal agencies with respect to paperwork. 44 U.S.C. ' 3503(a) and (b). The OIRA is responsible for developing uniform policies for efficient information processing, storage, and transmittal systems, both within and among agencies. *Id.*

The DQA, which is uncodified, amends the PRA. 44 U.S.C. 3501 et seq. It was enacted in December of 2000 as a two-paragraph provision buried in an appropriations bill. *See* Treasury and General Government Appropriation Act for Fiscal Year 2001, Pub. L. No. 106-554, ' 515 Appendix C, 114 Stat. 2763A-153 (2000) (attached to the back of this memo). The DQA took effect on October 1, 2002, the deadline for federal agencies to issue their final information quality guidelines.

II. Purpose of the Data Quality Act

Congress enacted the DQA primarily in response to increased use of the internet, which gives agencies the ability to communicate information easily and quickly to a large audience. Under the DQA, federal agencies must ensure that the information it disseminates meets certain quality standards. Congress' intent was to prevent the harm that can occur when government websites, which are easily and often accessed by the public, disseminate inaccurate information. *See Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication*, 67 F.R. 8452, 8452 (Feb. 22, 2002).1[1]

III. To Whom it Applies

The DQA applies to all federal agencies that are subject to the PRA. *See* 67 F.R. at 8453. The PRA defines "agency" as "any executive department, military department,

Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the executive office of the President), or any independent regulatory agency . . .” 44 U.S.C. ' 3502. The term “agency” does not include the General Accounting Office, Federal Election Commission, the D.C. government or the territories and possessions of the U.S. or their subdivisions, nor does it include “Government-owned contractor-operated facilities, including laboratories engaged in national defense research and production activities.” *Id.*

IV. Primary Directives of the Data Quality Act

On February 22, 2002, the OMB’s Office of Information and Regulatory Affairs (OIRA) published the final version of its *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies* (Guidelines). *See* 67 F.R. 8452. As provided in the DQA, the Guidelines mandate that each federal agency:

1. By October 1, 2002, issue its own information quality guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information that it disseminates;
2. Establish administrative mechanisms to allow affected persons to seek and obtain correction of information maintained or disseminated by the agency that does not comply with OMB or agency guidelines;
3. Report periodically to OMB the number and nature of complaints received by the agency regarding the accuracy of its information and how such complaints were resolved.

Id. at 8458.

A. Quality of Information

First, the agencies were to adopt a basic standard of quality of information as a performance goal as well as specific standards of quality appropriate for the various categories of information they disseminate. 67 F.R. at 8459. Each agency was required to publish its own guidelines in the Federal Register as well as on the agency’s website. *Id.* In addition, each agency promulgated guidelines that can be found on OMB’s website. *See* www.whitehouse.gov/omb/inforeg/agency_info_quality_links.html.

The Guidelines apply to a wide variety of government information dissemination activities and all types of media, including printed, electronic, or other. The Guidelines define “information” as “any communication or representation of knowledge such as facts or data, in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual forms.” 67 F.R. at 8460. This definition includes information that an agency disseminates from a web page, but does not include hyperlinks to information that others disseminate. The Guidelines also do not apply to opinions, where the agency’s presentation makes it clear that what is being offered is someone’s opinion rather than fact or the agency’s views. *Id.*

The Guidelines define “dissemination” as “agency initiated or sponsored distribution of information to the public”. *Id.* Explicitly not included within this term is distribution limited to “government employees or agency contractors or grantees; intra- or inter-agency use or sharing of government information; and responses to requests for agency records under the Freedom of Information Act, the Privacy Act, the Federal Advisory Committee Act or other similar law.” *Id.* It also does not include “distribution limited to correspondence with individuals or persons, press releases, archival records,

public filings, subpoenas or adjudicative processes.” *Id.* The exemption for information disseminated for adjudicative processes is intended to exclude “the findings and determinations that an agency makes in the course of adjudications involving specific parties.” 67 F.R. at 8454.

Under the Guidelines, “quality” encompasses “utility,” “objectivity,” and “integrity.” According to Guideline definitions, “utility” refers to the usefulness of the information to the public or any intended user. 67 F.R. at 8659. Before disseminating information, the agency must assess the potential uses of the information from its own perspective and that of the public. *Id.* “Integrity” refers to the security of information and the agency’s responsibility to ensure that information is protected from unauthorized access or revision. *Id.* at 8460.

Finally, “objectivity” involves both the presentation and substance of information. *Id.* at 8459. First, in order for information to be considered objective, it must be presented in an accurate, clear, complete, and unbiased manner. *Id.* The agency must present the information in the proper context and identify the source (to the extent possible consistent with confidentiality protections) along with the supporting data or models so that the public can assess for itself whether there may be some reason to question the objectivity of the sources. *Id.* Second, the substance of information disseminated must be accurate, reliable and unbiased. *Id.* Agencies must identify the sources of the disseminated information, the methods used to produce it, and provide full, accurate, and transparent documentation. 67 F.R. at 8460. Sound statistical research methods must be used to generate original and supporting data and develop analytical results. *Id.* at 8459. Data subjected to formal, independent, external peer review, is presumed to be of acceptable objectivity, although such a presumption is rebuttable. *Id.*

Information that agencies deem to meet OMB’s definition of “influential scientific, financial, or statistical information” also must be reproducible to demonstrate its objectivity. “Influential scientific, financial or statistical information” has a clear and substantial impact on important public policies or important private sector decisions. 67 F.R. at 8460. Agencies that disseminate such information must ensure a high degree of transparency about the data and methods to facilitate its “reproducibility” by qualified third parties. *Id.* “Reproducibility” means that the information is capable of being substantially reproduced, subject to an acceptable degree of imprecision. *Id.*

Notably, the objectivity standard does not override other compelling interests such as privacy, trade secrets, intellectual property, and other confidentiality protections. *Id.* When data is protected, the agency must apply an “especially rigorous robustness check to analytic results” and document what checks were undertaken. *Id.* Agency guidelines, however, must require in all cases a disclosure of the specific data sources that have been used and the specific quantitative methods and assumptions that have been employed. *Id.*

B. The Corrections Process – What Environmental Attorneys Should Know

Environmental attorneys should be aware of the DQA and the newly-implemented data quality guidelines from each federal agency. One important reason for this is that it may serve the best interest of a client to file a petition with an agency such as the Environmental Protection Agency, Federal Energy Regulatory Commission, U.S. Fish & Wildlife, Department of the Interior, Office of Surface Mining Reclamation and

Enforcement, Bureau of Land Management, or the Bureau of Indian Affairs, challenging the utility, objectivity or integrity of information that agency has disseminated. Petitions have already been filed with the EPA, which raise issues of how the agency is using scientific information. Under its own guidelines, the EPA has 90 days to respond to these petitions. *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by the Environmental Protection Agency*, at 31, available at www.epa.gov/oci/quality_guidelines/EPA-OEI-IQG-FINAL-10.2.pdf.

The DQA itself does not define the key terms of quality, utility, objectivity and integrity. Sydney Shapiro, a panelist at the Data Quality Act teleconference and board member for the Center for Progressive Regulation, expressed the views of many environmentalists. He argued that OMB, when defining these terms, attempted to model the regulatory process on the scientific process. According to Shapiro, this is fine up to a point, but the two processes have different goals. Science benefits when results are as accurate as possible, while regulations are made to protect people from harm and should always err on the side of safety. Finally, Shapiro argued that the DQA and its implementing guidelines will lead to costly litigation and mislead agencies from their mission.

During the teleconference, the panelists addressed the question of whether “dissemination” includes rule-making. Neither the DQA, nor its sparse legislative history, nor the OMB guidelines answer this question. One argument is that rule-making does not involve agencies “disseminating,” or actively giving out information. Instead agency rule-making involves receiving information. Individual agencies, however, including EPA, have applied their own guidelines to rule-making. *See e.g.*, EPA Guidelines at 15.

The panelists also discussed the petition process and how the DQA will be enforced. The DQA does not have a judicial review provision allowing for a party to take a data quality dispute to court. Whether or not such a provision is necessary for courts to review an agency’s denial of a petition to correct data is a question beyond the scope of this memorandum. Mark Greenwood, one of the panelists at the teleconference and former Director of EPA’s Office of Pollution Prevention and Toxics, anticipates that this question will be adjudicated in the next few years. If courts hold that there is no judicial review, the DQA probably will not have much of an effect on the way federal agencies use and disseminate data.

The Guidelines do not present an official position on the judicial review question although John Graham, Administrator for the OIRA, has opined that court involvement in policing data disputes is inevitable. Rena I. Steiner, *Toward Better Bubbles and Future Lives: A Progressive Response to the Conservation Agenda for Reforming Environmental Law*, 32 *Envtl. L. Rep.* 11421 (2002). One obvious problem with judicial review of data quality is that judges are often ill equipped to make determinations on the reliability of hyper-technical scientific data. An alternative danger posed by the DQA is that agencies may anticipate such action by courts and become timid about disseminating information and slower with rule-making. Industry lobbyists and other conservatives contend that Congress intended the DQA to “provoke a revolution in how decisions get made,” and meant to provide a means to force agencies and departments into court at any stage of the rule-making process if an affected party believes that inaccurate or unreliable

information has been considered. *Id.* This contention, however, has yet to be substantiated.

Text of The Data Quality Act:

- a) In General -- The Director of the Office of Management and Budget shall, by not later than September 30, 2001, and with public and Federal agency involvement, issue guidelines under sections 3504(d)(1) and 3516 of title 44, United States Code, that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of chapter 35 of title 44, United States Code, commonly referred to as the Paperwork Reduction Act.
- b) Content of Guidelines. – The guidelines under subsection (a) shall –
 - 1) apply to the sharing by Federal agencies of, and access to, information disseminated by Federal agencies; and
 - 2) require that each Federal agency to which the guidelines apply –
 - A) issue guidelines ensuring and maximizing the quality, objectivity, utility and integrity of information (including statistical information) disseminated by the agency, by not later than 1 year after the date of issuance of the guidelines under subsection (a);
 - B) establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued under subsection (a); and
 - C) report periodically to the Director –
 - i) the number and nature of complaints received by the agency regarding the accuracy of information disseminated by the agency; and
 - ii) how such complaints were handled by the agency